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No. 87-1564

In the Supreme Court of the United States

OCTOBER TERM, 1987

NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,
PETITIONER

v.

OTIS R. BOWEN, SECRETARY OF
HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Department of Health and Human Services (HHS) may recover federal grants paid to a State under the Aid to Families with Dependent Children program when the State is not entitled to retain the grants under HHS's interpretation of the governing statute and the State does not contest the reasonableness of HHS's interpretation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 835 F.2d 360. The opinion of the district court (Pet. App. 14a-24a) is reported at 648 F. Supp. 850.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25a) was entered on December 22, 1987. The petition for a writ of certiorari was filed on March 21, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of a dispute between the Department of Health and Human Services (HHS) and petitioner, a state social service agency, concerning petitioner's claim for federal reimbursement of the costs of certain foster care social services under Title IV-A of the Social Security Act, 42 U.S.C. 601 *et seq.* Under HHS's interpretation of the relevant provisions of Title IV-A, petitioner is not entitled to reimbursement for the costs at issue and must return federal grants that were erroneously given to petitioner in connection with those costs. Petitioner does not contest the reasonableness of HHS's interpretation of the governing reimbursement provisions. Petitioner nonetheless contends that, under the particular facts of this case, it must be permitted to retain grant monies to which it is not entitled under HHS's interpretation.

1. Title IV-A of the Social Security Act establishes the Aid to Families with Dependent Children (AFDC) program, a cooperative federal-state program for providing aid and services to needy families with children. Under the AFDC program, States that provide aid and services in accordance with the terms of a plan approved by the Secretary are eligible to receive federal grants ("federal financial participation" or "FFP") covering specified portions of state costs (42 U.S.C. 601-603). Among the services covered by Title IV-A are social services for needy foster children. During the period relevant to this case, the foster care social services that participating States were obligated to provide were set forth in Section 408(f) of the Social Security Act, 42 U.S.C. 608(f).[1]

[1] In 1980, Congress repealed Section 408 and transferred the AFDC foster care program from Title IV-A to Title IV-E of the Social Security Act. Pub. L. No. 96-272, § 101(a)(2), 94 Stat. 512 (42 U.S.C. 670 *et*

Before 1975, States that provided the foster care social services mandated by Section 408(f) were eligible for FFP for those services under Title IV-A. Under Section 403(a)(3) of the Social Security Act, 42 U.S.C. 603(a)(3), States are eligible to be reimbursed by HHS for a specified percentage of the administrative costs of state plans. Although the costs of foster care social services would not otherwise qualify as administrative costs, Section 408(d), 42 U.S.C. 608(d), provided that foster care social services required by Section 408(f) were to "be considered as part of the administration of the State plan" under Section 403(a)(3).

In 1975, Congress substantially revised federal funding of state social services under the AFDC program. Congress transferred the social services component of Title IV-A to a new title of the Social Security Act, Tit. XX, 42 U.S.C. 1397 *et seq.*, which established a comprehensive program for state provision of federally subsidized social services. Like Title IV-A, Title XX provides FFP for covered state expenditures. Unlike Title IV-A, however, Title XX subjects state reimbursement claims to a specified appropriations cap (42 U.S.C. 1397a(a)(2)(A)).

In order to prevent States from continuing to obtain reimbursement under Title IV-A for costs related to AFDC social services, thereby circumventing the financial cap imposed by Title XX, Congress amended Title IV-A by adding the so-called "except clause" to Section 403(a)(3). The "except clause" modifies Section 403(a)(3)'s

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seq.). The financial claims at issue in this case are confined to the period from 1975 to 1980, before the repeal of Section 408. Except as otherwise noted, all references to the Social Security Act refer to the terms of the Act as they appear in the 1976 edition of the United States Code. References to "HHS" include the Department of Health, Education, and Welfare, HHS's predecessor agency during the period in question.

general authorization of FFP for state AFDC administrative costs by providing, "except that no payment shall be made [under Title IV-A] with respect to amounts expended in connection with the provision of any service described in [42 U.S.C.] 1397a(a)(1)." Section 1397a(a)(1) is the section that identifies the social services eligible for FFP under Title XX. By its terms, therefore, the "except clause" eliminates FFP under Title IV-A for services covered by Title XX.

2. Among the social services described in Section 1397a(a)(1) are "services for children and adults in foster care." Because the "except clause" expressly excludes all services described in Section 1397a(a)(1) from reimbursement under Title IV-A, the "except clause" on its face appears to foreclose federal reimbursement under Title IV-A for the costs of foster care social services. Despite the apparent clarity of the "except clause," however, petitioner continued to apply for reimbursement of foster care social services under Title IV-A after 1975.

Petitioner did so by employing a procedure that became known as the "AFDC-FC shift." Under this procedure, petitioner applied for reimbursement under Title XX until it reached the Title XX reimbursement cap. Petitioner then shifted its claims for remaining foster care social service costs from Title XX to Title IV-A, thereby avoiding the effect of the Title XX cap.

Petitioner's use of the AFDC-FC shift initially elicited inconsistent responses from HHS personnel involved in the administration of the AFDC program. In November 1976, petitioner's first post-1975 claim for reimbursement of foster care social service costs under Title IV-A was disallowed by HHS Region II, the regional office responsible for New York. In June 1977, however, Region II recommended to HHS's central office in Washington that the November 1976 disallowance be withdrawn. Region II

relied on the "Hoadley memorandum," a one-page memorandum by an official in HHS's Assistance Payments Administration. The Hoadley memorandum asserted, without referring to the "except clause" or Section 403(a)(3) more generally, that States were entitled to reimbursement under Title IV-A for all services required by Title IV-A. The Hoadley memorandum was at odds with a more detailed analysis, prepared in HHS's Office of General Counsel in February 1977, which concluded that the "except clause" foreclosed reimbursement of foster care social service costs under Title IV-A. Nonetheless, Region II personnel advised petitioner on the basis of the Hoadley memorandum that petitioner could employ the AFDC-FC shift to claim reimbursement for foster care social services under Title IV-A.

For roughly two years, HHS accepted claims for reimbursement of foster care social service costs under Title IV-A. Beginning in May 1979, however, HHS began to defer payment of such claims pending further review of their allowability. By regulation (45 C.F.R. 201.15(c)), deferral of claims for FFP may be employed only when a regional administrator concludes that a claim "is of questionable allowability." During the period from 1979 to 1981, HHS made efforts to resolve the uncertainty within the agency over the allowability of claims for foster care social service costs under Title IV-A.

In June 1981, HHS issued a formal, agencywide directive interpreting the "except clause" as it applied to foster care social services. HHS interpreted the "except clause" to preclude States from recovering foster care social service costs under Title IV-A, thereby prohibiting the AFDC-FC shift. Aid to Families with Dependent Children Action Transmittal, SSA-AT-81-18 (June 24, 1981). Based on HHS's formal interpretation, Region II subsequently disallowed three claims by petitioner for reimbursement of

previously incurred foster care social service costs under Title IV-A. Petitioner appealed Region II's disallowances to HHS's Departmental Grant Appeals Board (GAB), which affirmed the disallowances based on a review of the "except clause" and the related provisions of Title IV-A and Title XX.

3. Following the GAB's decision, petitioner brought suit against the Secretary in the United States District Court for the District of Columbia under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, challenging the disallowance of the foster care social service claims. Although petitioner initially advanced a variety of objections to the disallowance, only one remains at issue. Petitioner contended that, even if HHS's 1981 administrative interpretation of the "except clause" is a reasonable one, and therefore is binding under the longstanding principles reaffirmed in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984), the Secretary nevertheless is precluded from recovering the amounts due under that interpretation because of the inconsistent view of the "except clause" taken by subordinate HHS personnel before 1981 (Pet. App. 15a).

The district court, presented with cross-motions for summary judgment, entered judgment in favor of the Secretary. The district court concluded that the construction of the "except clause" adopted by HHS in 1981 and reaffirmed by the GAB was a reasonable reading of the language, structure, and legislative history of the statute (Pet. App. 20a-22a). The district court noted that the only other judicial decision that had addressed the issue, *Oregon Dep't of Human Resources* v. *Heckler*, 651 F. Supp. 6 (D. Or. 1984), had agreed with HHS's construction as a matter of de novo interpretation (Pet. App. 22a n.9). The district court reasoned that, because "[t]he language of the statute is mandatory[,] HHS officials

never had authority or discretion to give dispensation from it" (*id.* at 23a). Because "no 'policy' * * * can be enforced in contravention of an express statutory command," petitioner was therefore required to abide by the reimbursement limitations imposed by the "except clause," regardless of the equitable arguments advanced by petitioner for excusing compliance (*ibid.*).

On appeal, the United States Court of Appeals for the District of Columbia Circuit unanimously affirmed. The court of appeals agreed that "HHS' interpretation [of the 'except clause'] is reasonable under controlling principles of statutory interpretation" (Pet. App. 2a). The court further held that, in the circumstances of this case, petitioner was bound by the terms of the statute as reasonably interpreted by HHS (*ibid.*).

In response to petitioner's argument that HHS originally had interpreted the "except clause" to permit continued reimbursement of foster care social service costs under Title IV-A, and that HHS's 1981 interpretation therefore represented a reversal of the agency's original interpretation and could not be applied retroactively, the court of appeals reviewed the record of the agency's conduct before 1981 (Pet. App. 8a-12a). The court recognized that different HHS personnel had held divergent views of the statute before 1981, with "the majority view, as it were," favoring an interpretation of the "except clause" that would allow the AFDC-FC shift (*id.* at 11a). The court found from the record, however, that "there was no *official* HHS interpretation of the statute prior to 1981"—"[n]o authoritative pronouncement [by HHS] in the form of an Action Transmittal or other formal agency statement of position" (*ibid.* (emphasis in original)). The one-page 1977 Hoadley memorandum, which petitioner sought to characterize as an official interpretation of the "except clause" by HHS, was "only the recapitulation of a

telephone conversation between two mid-level agency employees"; it did not refer to the "except clause" or Section 403(a)(3), much less undertake any analysis of those provisions, and petitioner offered no evidence that the memorandum writer had held the authority to issue official HHS interpretations in this fashion (Pet. App. 11a). In contrast, the official interpretation adopted by HHS in 1981 bore all of the earmarks of a formal exercise in interpretive rulemaking by the agency, culminating in formal review by HHS's Office of General Counsel and approval by the Commissioner of Social Security (*id.* at 12a).

The court of appeals concluded that HHS's 1981 interpretation "represented the first official, binding pronouncement on the question" of the AFDC-FC shift (Pet. App. 13a). In these circumstances, the court found no reason "why the agency's hands must be tied by * * * informal representations at non-authoritative echelons of the agency's hierarchy" (*ibid.*). Given the absence of a prior official interpretation of the "except clause" by HHS, the court found it unnecessary to address the circumstances in which an agency might be foreclosed from applying a statutory interpretation retroactively in the face of an inconsistent prior interpretation by the agency (*id.* at 12a-13a).

ARGUMENT

Contrary to petitioner's assertions, the decision below does not present the questions regarding retroactive changes in federal grant obligations that were left open by this Court in *Bennett* v. *Kentucky Dep't of Education*, 470 U.S. 656 (1985), and by Justice White's prior concurrence in *Bell* v. *New Jersey*, 461 U.S. 773 (1983). The court of appeals decided this case instead on quite different, and far more narrow, legal grounds. Petitioner has not taken

issue with the specific legal principles on which the decision of the court of appeals rests, nor is there any basis for petitioner to do so. The court correctly applied those principles in the particular circumstances of this case, and in any event the correctness of the application of those principles to particular facts is not an issue that merits this Court's attention, particularly in the absence of any suggestion by petitioner that the decision of the court of appeals conflicts with the decisions of other courts.

1. In *Bennett* v. *Kentucky Dep't of Education*, *supra*, this Court upheld the authority of the Secretary of Education to recover federal educational grants that had been misapplied by a State under Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 2701 *et seq.* In deciding that the Secretary was entitled to recover the grants in dispute, the Court stated that "we have no occasion in this case to address the circumstances, if any, in which the Secretary could impose liability for expenditures made in reliance upon an earlier interpretation [of the governing statute] provided by the Department" (470 U.S. at 670). *Bennett* thus leaves open the question when, if ever, an agency may be foreclosed from enforcing a reasonable administrative interpretation of a federal grant statute by the existence of a prior, inconsistent interpretation by the agency.

Although petitioner offers this case as a vehicle for resolving that question, the court of appeals found it unnecessary to reach the question in order to dispose of petitioner's claim (Pet. App. 12a-13a). The issue posed by *Bennett* presupposes that an agency is attempting to enforce the second of two inconsistent administrative interpretations of a grant statute. But as explained above, the court of appeals determined from the record in this case that the interpretation of Title IV-A to which petitioner objects was the first interpretation by HHS itself, as

distinct from earlier informal representations by subordinate agency personnel. In the court's words, HHS's formal interpretative ruling in 1981 "did not embody a *change* in the agency's position[;] [i]nstead, it represented the first official, binding pronouncement on the question" (*id.* at 13a (emphasis in original)). Accordingly, the court of appeals did not decide (and had no occasion to decide) whether HHS would be entitled to recover Title IV-A grants from petitioner if petitioner had received and expended the grant monies in reliance on a contrary prior administrative interpretation by HHS itself. Because it "pretermit[ted] the need to address specifically [petitioner's] arguments * * * concerning retrospective application of newly-minted agency interpretations" (*id.* at 12a-13a), the court simply did not address the retroactivity question posed by *Bennett* and advanced in the present petition.

Neither does the court's decision present the related question regarding retroactive administrative changes in federal grant obligations posed by Justice White's concurrence in *Bell* v. *New Jersey*, 461 U.S. at 793-794. In *Bell*, Justice White described as "a significant issue" the question "whether a State can be required to repay [a federal grant] * * * if the [federal agency's] claim of violation [of grant obligations by the State] rests on a new regulation or construction of the statute issued after the State entered the program and had its plan approved" (*id.* at 794). Justice White's concurrence looks to the permissibility of retroactively imposing new substantive obligations on a State receiving federal grants. In this case, there is no contention that HHS retroactively increased or otherwise altered the substantive standards that petitioner was required to meet in order to be eligible for AFDC grants. The issue in this case involves not the obligation of a State to provide services, but rather the obligation of the federal

government to bear part of the cost of those services. That issue is unrelated to Justice White's concerns in *Bell*.[2]

2. The decision of the court of appeals in this case rests on a narrow and, in our view, unexceptional proposition: before an agency can possibly be foreclosed from applying a reasonable interpretation of its organic legislation by the existence of a contrary prior administrative interpretation, the prior interpretation must have been sufficiently deliberate and formal, in terms of both what was said and who said it, that it fairly can be characterized as an official interpretation of the agency itself. Petitioner does not take issue with this premise, and we do not see how it could do so. Cf. *Lyng* v. *Payne*, 476 U.S. 926, 937 (1986) ("not all agency publications are of binding force"); *Schweiker* v. *Hansen*, 450 U.S. 785, 789 (1981) (Social

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[2] For similar reasons, contrary to petitioner's suggestion (Pet. 14), the decision of the court of appeals does not implicate the concerns underlying this Court's decision in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981). In *Pennhurst*, this Court held that Congress "must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds" (451 U.S. at 24). In this case, petitioner at no point has suggested any ambiguity regarding either the existence or the extent of the substantive obligations imposed by Congress on States that participate in the AFDC program. By its terms, *Pennhurst* does not address the specificity with which Congress defines the reimbursement rights and obligations of federal agencies. Cf. *Bell* v. *New Jersey*, 461 U.S. at 790 n.17 (distinguishing *Pennhurst* as a case that "arose in the context of imposing an unexpected condition for compliance—a new obligation for participating States—while here our concern is with the remedies available [to the federal government] against a noncomplying State"). In any event, *Pennhurst* does not impose any substantive restrictions on the power of Congress or federal agencies; it simply establishes a "rule of statutory construction" (451 U.S. at 24) for interpreting federal grant statutes. Because petitioner is not contesting the reasonableness of HHS's interpretation of the "except clause," *Pennhurst* has no applicability to the issues in this case.

Security Administration Claims Manual "is not a regulation[;] [i]t has no legal force, and it does not bind the SSA"); *Heckler* v. *Community Health Services,* 467 U.S. 51, 60 n.12 (1984).

It seems self-evident that if a party chooses to rely on representations by agency personnel that are not deliberate and formal enough to rise to the level of an official agency position, the reliance interests at stake are not sufficiently reasonable to foreclose the agency from enforcing the law as it is properly interpreted. After all, it is the Secretary, not his subordinates, to whom Congress has delegated authority. See 42 U.S.C. 602; *Schweiker* v. *Grey Panthers,* 453 U.S. 34, 43-44 (1981); see also *Cuyahoga Valley Ry.* v. *United Transportation Union,* 474 U.S. 3, 6-7 (1985). The authority of subordinates to interpret the law is the product of a delegation by the Secretary, and, on matters of interpretation that are sufficiently controversial to produce differing opinions within the agency, it is the Secretary (or at least his highest subordinates) that must have the controlling word.[3]

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[3] For reasons adverted to by the district court, we do not believe that HHS properly could be foreclosed from recovering erroneous grant payments under a reasonable interpretation of the governing statutory provisions even if HHS *had* formally adopted an inconsistent interpretation at a prior time. Under Section 403(b)(2)(A) of the Social Security Act, 42 U.S.C. 603(b)(2)(A), the Secretary is required to reduce the amount awarded to a State under Title IV-A "by any sum by which he finds that his estimate for any prior quarter was greater * * * than the amount which should have been paid to the State for such quarter." See generally *Maryland Dep't of Human Resources* v. *Department of Health & Human Services,* 763 F.2d 1441, 1444, 1456-1457 (D.C. Cir. 1985) (construing substantially identical provision of Title XX to give HHS right to recover Title XX grants). The obligation imposed on the Secretary by Section 403(b)(2)(A) is an unqualified one: by its terms, the provision leaves

Petitioner's quarrel with the court of appeals lies not with the validity of this principle, but with the court's application of the principle to the facts of this case. The court, based on its review of the record, concluded that the pre-1981 representations by HHS personnel in support of the AFDC-FC shift were not sufficiently formal and authoritative to be deemed an administrative interpretation by the agency (Pet. App. 8a-12a). Petitioner takes issue with the Court's assessment of those representations, arguing principally that the representations supporting the AFDC-FC shift were more formal and more extensive than the court of appeals acknowledged (Pet. 12-13).

We believe that the court of appeals' conclusion regarding HHS's pre-1981 treatment of the AFDC-FC shift, a conclusion based on a careful review of the record, is correct. The court's opinion discusses in detail the reasons why the actions of HHS personnel before 1981 cannot fairly be characterized as constituting an official interpretive position on the part of HHS, and none of the arguments advanced by petitioner should obscure the fundamental contrast between the informal statements by subordinate HHS personnel before 1981 and the formal deliberative process that underlay the adoption of HHS's official interpretation in 1981. In particular, the 1981 interpretation—in marked contrast to what had come before—was subjected to several layers of review within the agency, including presentation to the Secretary, and

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the Secretary without discretion to forgo recovery of past payments "greater * * * than the amount which should have been paid." Accordingly, assuming a State has received grants to which it is not entitled under an otherwise reasonable and binding administrative interpretation of Title IV-A, Section 403(b)(2)(A) leaves no room for HHS—or the courts—to excuse repayment of the grants simply because HHS previously had taken a different view of the relevant statutory provisions.

was then embodied in a formal action transmittal letter (see Pet. App. 12a).[4]

In any event, even if reasonable persons could fairly debate the court's conclusion about which of the views expressed at various times should be regarded as the first "official agency interpretation" (Pet. App. 12a), any such debate would present an entirely fact-bound question, of no significance beyond the confines of this case. Review by this Court of the court of appeals' decision would serve no purpose other than to reexamine a factual record that has been reviewed twice already by the courts below.

3. Petitioner has identified no conflict among the lower courts that might be implicated by the decision of the court of appeals in this case. Petitioner does not claim, and we are not aware of, any conflict among the courts over the retroactivity questions left open by this Court's decision in *Bennett* or Justice White's concurrence in *Bell*—questions that, in any event, this case does not pose. Neither are we aware of any conflict regarding the narrower legal principles on which the decision below actually rests. Petitioner has identified no case in which a federal agency has been prohibited from recovering grants from a State on the basis of an inconsistent prior administrative interpretation of the grant statute. Nor has petitioner

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[4] Contrary to petitioner's suggestion (Pet. 13), the bare fact that HHS personnel initially awarded Title IV-A grants to petitioner on the basis of a mistaken view of the "except clause" cannot give binding force to what otherwise would be nonbinding representations regarding the permissibility of the AFDC-FC shift. If the payment of federal grant monies were deemed an official agency interpretation, as petitioner argues, the federal government would rarely if ever be able to recover misallocated federal grants, since recipients would invariably invoke the grants themselves as administrative interpretations on which they reasonably relied. Cf. *Bell* v. *New Jersey, supra; Bennett* v. *Kentucky Dep't of Education, supra.*

pointed to any case in which an agency has been precluded from enforcing a reasonable administrative interpretation of its governing statute by prior representations of the sort involved here.[5] If the issues that petitioner seeks to litigate here are indeed sufficiently important, recurring, and difficult to merit this Court's attention, then presumably a conflict will arise at some time in the future, and the Court can then resolve that conflict with the benefit of the considered views of the lower courts. In the absence of such a conflict, further review is not warranted.

4. For reasons addressed in our briefs in the consolidated cases *Bowen* v. *Massachusetts*, No. 87-712, and *Massachusetts* v. *Bowen*, No. 87-929 (argued Apr. 20, 1988), we believe that the district court and the court of appeals lacked jurisdiction in this case. Petitioner's suit effectively sought to compel the Secretary to pay out money under Title IV-A by prohibiting the Secretary from setting off past overpayments against future AFDC grants. For that reason, petitioner's claims would appear to lie within the exclusive jurisdiction of the Claims Court under the Tucker Act (28 U.S.C. 1491). The leading case supporting a contrary view is *Maryland Dep't of Human Resources* v. *Department of Health & Human Services*, 763 F.2d 1441 (D.C. Cir. 1985). Although we regard that case as wrongly decided on this point (for the reasons we have given at length in our *Massachusetts* briefs), it was binding precedent in the courts below, and for that reason the Secretary did not contest (and the opinions below do not address) the jurisdiction of the district court and court of appeals.

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[5] The only other court to review a disallowance of foster care social service costs under the "except clause" rejected a claim similar to petitioner's, cast in terms of estoppel, by the State of Oregon. See *Oregon Dep't of Human Resources*, 651 F. Supp. at 12.

Petitioner, although it is well aware of the pendency of the *Massachusetts* cases,[6] has not raised any jurisdictional issues in the petition. In light of petitioner's apparently deliberate decision not to petition on jurisdictional grounds, even as a protective measure, we see no need for the Court to hold this petition pending its decision in *Massachusetts*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1988

[6] Just a few days after the petition in this case was filed, the State of New York filed an amicus brief in the *Massachusetts* cases, as did 13 other States that were represented in that case by the same lawyer who now appears as counsel of record for petitioner.

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